(3)

Supreme Court, U.S.
FILED
MAY 9 2001
OFFICE OF THE CLERK

No. 00-997

# In the Supreme Court of the United States

ERIC SCHMIDT, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

BARBARA D. UNDERWOOD
*Acting Solicitor General*
*Counsel of Record*
JOHN C. KEENEY
*Acting Assistant Attorney General*
THOMAS E. BOOTH
*Attorney*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

24 pp

## QUESTIONS PRESENTED

1. Whether petitioners were entitled to a new trial based on a government witness's false or contradictory testimony where the defense exposed the witness's falsehoods during cross-examination and argued to the jury that the witness had been thoroughly impeached.

2. Whether, when a court of appeals conducts plain-error analysis under Federal Rule of Criminal Procedure 52(b) of a claim of legal error that became clear only as the result of an intervening change in the settled law of the circuit, the defendant bears the burden of establishing that he was prejudiced by the error.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 9 |
| Conclusion | 20 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Barrientes* v. *Johnson*, 221 F.3d 741 (5th Cir. 2000), cert. dismissed, 121 S. Ct. 902 (2001) | 12 |
| *Brady* v. *Maryland*, 373 U.S. 83 (1963) | 6 |
| *Giglio* v. *United States*, 405 U.S. 150 (1972) | 9, 10, 11 |
| *Johnson* v. *United States*, 520 U.S. 461 (1997) | 8, 14, 15, 16 |
| *Kyles* v. *Whitley*, 514 U.S. 419 (1995) | 12 |
| *Napoli* v. *United States*, 45 F.3d 680 (2d Cir.), cert. denied, 514 U.S. 1084 (1995) | 15 |
| *Napue* v. *Illinois*, 360 U.S. 264 (1959) | 9, 11 |
| *Neder* v. *United States*, 527 U.S. 1 (1999) | 7 |
| *O'Keefe* v. *United States*, 523 U.S. 1078 (1998) | 2 |
| *United States* v. *Atkinson*, 297 U.S. 157 (1936) | 13 |
| *United States* v. *Ballistrea*, 101 F.3d 827 (2d Cir. 1996), cert. denied, 520 U.S. 1150 (1997) | 15 |
| *United States* v. *Baumgardner*, 85 F.3d 1305 (8th Cir. 1996) | 17 |
| *United States* v. *Burch*, 156 F.3d 1315 (D.C. Cir. 1998), cert. denied, 526 U.S. 1011 (1999) | 10 |
| *United States* v. *Gaudin*, 515 U.S. 506 (1995) | 16 |
| *United States* v. *Higgins*, 75 F.3d 332 (7th Cir. 1996) | 12 |
| *United States* v. *Joyner*, 201 F.3d 61 (2d Cir. 2000) | 10, 11, 12 |
| *United States* v. *Knoll*, 116 F.3d 994 (2d Cir. 1997), cert. denied, 522 U.S. 1118 (1998) | 17 |
| *United States* v. *Langston*, 970 F.2d 692 (10th Cir.), cert. denied, 506 U.S. 965 (1992) | 10 |

Cases—Contined: Page

*United States* v. *Maloof*, 205 F.3d 819 (5th Cir.), cert. denied, 121 S. Ct. 176 (2000) ..... 12
*United States* v. *Malpeso*, 115 F.3d 155 (2d Cir. 1997), cert. denied, 524 U.S. 951 (1998) ..... 15, 18
*United States* v. *Olano*, 507 U.S. 725 (1993) ..... 13, 14, 15, 16
*United States* v. *Perkins*, 94 F.3d 429 (8th Cir. 1996), cert. denied, 519 U.S. 1136 (1997) ..... 10
*United States* v. *Rodriguez*, 162 F.3d 135 (1st Cir. 1998), cert. denied, 526 U.S. 1152 (1999) ..... 12
*United States* v. *Santiago*, 238 F.3d 213 (2d Cir. 2001) ..... 14-15, 18
*United States* v. *Santiago*, 798 F.2d 246 (7th Cir. 1986) ..... 10, 11
*United States* v. *Viola*, 35 F.3d 37 (2d Cir. 1994), cert. denied, 513 U.S. 1198 (1995) ..... 13, 14, 15
*United States* v. *Walsh*, 75 F.3d 1 (1st Cir. 1996) ..... 12
*United States* v. *White*, 238 F.3d 537 (4th Cir. 2001) ..... 10

Constitution, statutes and rules:

U.S. Const. Amend. V (Due Process Clause) ..... 9
18 U.S.C. 371 ..... 2
18 U.S.C. 1341 ..... 2
18 U.S.C. 1343 ..... 2, 7
18 U.S.C. 1956(a)(2)(A) ..... 2
Fed. R. Crim. P.:
Rule 24(c) ..... 14
Rule 52(b) ..... 13, 14, 15, 16

# In the Supreme Court of the United States

No. 00-997

ERIC SCHMIDT, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is unpublished, but the decision is noted at 229 F.3d 1148 (Table). An earlier opinion of the court of appeals (Pet. App. 34a-67a) is reported at 128 F.3d 885. An earlier opinion of the district court (Pet. App. 68a-152a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on August 11, 2000. A petition for rehearing was denied on September 14, 2000 (Pet App. 205a-206a). The petition for a writ of certiorari was filed on December 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioners Eric Schmidt, Michael O'Keefe, Sr., and Gary Bennett were convicted of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. 371 (Count 1); wire fraud, in violation of 18 U.S.C. 1343 (Counts 2 and 4); mail fraud, in violation of 18 U.S.C. 1341 (Counts 5-7); and money laundering, in violation of 18 U.S.C. 1956(a)(2)(A) (Counts 14-23). Petitioner Paul Schmitz was convicted of a single mail fraud count (Count 12).[1]

After trial, the district court granted a new trial based on prosecutorial misconduct. On the government's appeal, the court of appeals reversed the new trial order and remanded. Pet. App. 34a-67a. This Court denied certiorari. *O'Keefe* v. *United States*, 523 U.S. 1078 (1998) (No. 97-1542). O'Keefe was later sentenced to 235 months' imprisonment; Schmidt was sentenced to 121 months' imprisonment; Bennett was sentenced to 97 months' imprisonment; and Schmitz received a three-year term of probation. The court of appeals affirmed. Pet. App. 1a-33a.

1. Petitioners and co-defendant John O'Brien (see note 1, *supra*) engaged in a fraudulent scheme to siphon off millions of dollars in assets of Physicians National Risk Retention Group, Inc. (PNRRG), a Louisiana medical malpractice insurer. O'Keefe, who had twice

---

[1] Co-defendant John O'Brien was convicted of mail and wire fraud conspiracy, wire fraud, and money laundering. He was sentenced to 121 months' imprisonment and was ordered to pay restitution. O'Brien has filed a separate petition for certiorari that raises an issue substantially identical to the third question presented in the petition in this case. That petition is currently pending before the Court. See *O'Brien* v. *United States*, No. 00-896 (filed Dec. 1, 2000).

been convicted of fraud, was selected to operate Associated Auditors, the management company for PNRRG. Schmidt served as president of PNRRG. O'Brien and Bennett were also involved in the management of PNRRG, and Schmitz was a claims manager. Pet. App. 2a; Gov't. C.A. Br. 7-8, 23.

PNRRG became insolvent, and the State of Louisiana moved to liquidate it. Petitioners and O'Brien arranged to have Builders and Contractors Insurance Limited (BCI), a dormant Bahamian corporation that was controlled by Charles Donaldson, act as a reinsurer. The Louisiana Department of Insurance and the Board of PNRRG approved the reinsurance agreement, based on petitioners' assurances that the reinsurance program would be backed by Sphere Drake, an established reinsurance company with assets in excess of $500 million; that coverage of PNRRG's physicians would continue; and that all future claims would be paid by BCI. Attorney Johnny Moore participated in the negotiation of the reinsurance contract with O'Keefe on behalf of the Louisiana Insurance Department. Pet. App. 2a-3a, 7a, 35a; Gov't. C.A. Br. 7-8, 23-24.

Based on petitioners' representations that the reinsurance program would require additional funding, PNRRG and the Louisiana Department of Insurance authorized the transfer of more than $10 million in cash assets of PNRRG to a trust account of O'Keefe's law firm, with the funds to be held on behalf of BCI. Petitioners and O'Brien entered into a reinsurance contract with Sphere Drake. At O'Brien's direction, however, they canceled the contract a few months later. Neither PNRRG nor the Louisiana Department of Insurance was advised of the cancellation. Petitioners also canceled the insurance coverage of a large number of physicians before the expiration date, and they failed

to pay claims for the insured physicians as promised. Pet. App. 3a; Gov't. C.A. Br. 7-8, 24-26.

Associated Insurance Consultants, Inc. (AIC), a management company owned by O'Brien, Schmidt, and Bennett, signed a management contract to handle the claims and carry out the terms of the reinsurance agreement on BCI's behalf. The insured physicians, the Board of PNRRG, and the Louisiana Department of Insurance were unaware of that management contract, which resulted in AIC's receipt of more than $5 million in profits generated by the cancellation of the Sphere Drake contract, the early cancellation of the physicians' insurance coverage, and the failure to pay claims. Ultimately, that money was diverted to the personal bank accounts of O'Brien, Schmidt, and Bennett. Pet. App. 3a; Gov't. C.A. Br. 25-26, 28-30.

A representative of the Louisiana Department of Insurance testified that the Department would not have entered into the reinsurance agreement if it had known that petitioners intended to cancel physicians' insurance coverage. Pet. App. 10a; Gov't. C.A. Br. 53. An attorney for the Department testified that in approving the reinsurance agreement with BCI, the Department sought a solvent insurer for the plan, and that the Department was not informed of the cancellation of the reinsurance contract with Sphere Drake. *Id.* at 54. Physician PNRRG board members similarly testified to their understanding, based on representations from petitioners, that the agreement would protect doctors. *Ibid.* The physicians also testified that they were unaware of the profit diversion or the cancellation of the Sphere Drake reinsurance contract. *Ibid.*

2. Donaldson and Moore were two of the primary witnesses against petitioners at trial. The Federal

Bureau of Investigation (FBI) prepared a "302 Report" that documented an interview between Donaldson, an FBI agent, attorneys for both Donaldson and the government, and other law enforcement personnel. Pet. App. 36a. According to the report, a participant in the interview stated that "O'Keefe suggested that BCI's shareholders meeting minutes be altered to make it appear that Donaldson had authority to enter into the PNRRG/BCI contract." *Ibid.* The 302 Report did not identify the person who had made the statement, but when Donaldson pleaded guilty in federal court, the prosecutors incorporated the statement into the factual basis of the guilty plea in such a way as to make it appear that Donaldson had made the statement. *Ibid.*

At trial, the government furnished the 302 Report to the defense just before Donaldson testified on direct examination. Pet. App. 36a-37a. On direct examination, the government did not ask Donaldson any questions about the minutes. *Id.* at 37a. On cross-examination, Donaldson first appeared to deny, but ultimately admitted, that he had falsely accused O'Keefe of participating in the alteration of the minutes. *Id.* at 37a & n.2. Petitioners subsequently moved to strike Donaldson's testimony, but the district court overruled the objection. *Id.* at 38a-39a. In their closing argument, petitioners emphasized that in their view Donaldson's testimony had been successfully impeached, and they urged the jury not to credit that testimony. *Id.* at 39a, 57a-58a & n.10.

After petitioners had been found guilty by the jury, the district court granted a new trial on the ground of prosecutorial misconduct. The court concluded that Donaldson had perjured himself both before and during trial and that the prosecutors had known of the perjury. The court also found that the government had failed to

comply with its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963); that changes in Johnny Moore's testimony at trial had become significant in light of Donaldson's false testimony; and that the government had redrafted the indictment in an attempt to mislead the defense. Pet. App. 39a-40a; see *id.* at 68a-152a.

3. The court of appeals reversed and remanded. Pet. App. 34a-67a. The court stated that Donaldson's falsehoods, "to the extent that any were uttered, occurred as a result of the defense's cross-examination, not from testimony elicited by the prosecution. Once those falsehoods emerged, the defense had total leeway in cross-examining Donaldson and used the information provided by the prosecution to powerful effect." *Id.* at 56a. The court stressed that the defense had "ably exploited" the 302 Report to impeach Donaldson. *Id.* at 57a. Even if the government had a duty to correct any falsehoods that were not corrected by Donaldson himself, the court stated, "any attempt by the prosecution to intercede during this cross-examination would have actually harmed the defense by depriving the jury of the full, dramatic effect." *Ibid.*

The court of appeals determined that Donaldson's "falsehoods were sufficiently exposed before the jury to enable the jury to weigh those falsehoods in its deliberations." Pet. App. 57a. The court noted that petitioners had made the impeachment of Donaldson "the centerpiece of their closing arguments," and that the district court had "included a strong cautionary statement in the jury instructions." *Id.* at 58a. The court also observed that "the testimony of Donaldson was overwhelmingly corroborated by other witnesses, and the falsehoods occurred on collateral matters." *Id.* at 60a. The court of appeals concluded that there was no "reasonable probability that the jury would have

reached a different outcome even had it been fully aware of all of the alleged inconsistencies and falsehoods in Donaldson's testimony." *Id.* at 62a; see *id.* at 60a ("given the degree of impeachment of Donaldson on the stand, any further impeachment * * * would merely have been cumulative").[2]

4. On remand, the district court reinstated the convictions after denying petitioners' remaining claims for reversal. The court of appeals affirmed. Pet. App. 1a-33a. During the pendency of the appeal in this case, this Court held in *Neder* v. *United States*, 527 U.S. 1 (1999), that materiality is an element of wire fraud under 18 U.S.C. 1343. On appeal, petitioners and co-defendant O'Brien contended that the district court had failed to submit the question of materiality to the jury and that the omission required reversal of their convictions.

The court of appeals agreed that the jury instructions had not clearly identified materiality as an essential element of the mail and wire fraud offenses. Pet. App. 17a.[3] The court stated, however, that in the absence of

---

[2] The court of appeals also ruled that the district court had abused its discretion in finding that the government had changed the indictments to mislead the defense. Pet. App. 55a-56a. The court of appeals further held that the district court's remaining findings of government misconduct were untenable in light of the reversal on the perjury claim. *Id.* at 62a-66a.

[3] The court explained:

> As the government points out, there is some language in the jury instructions regarding materiality, such as the instructions that intent to defraud may be found "from a material misstatement of fact made with reckless disregard of the facts," and that "[a] statement * * * or representation is 'false' within the meaning of the wire fraud and mail fraud statutes when it constitutes a half truth, or effectively conceals

a timely objection at trial, the omission of that element was reviewable only for plain error. *Ibid.* (citing *Johnson* v. *United States*, 520 U.S. 461, 463-466 (1997)). Under the plain-error standard, the court explained, an appellant must establish error that is "plain" and affects his "substantial rights." *Ibid.* "Even if these requirements are met," the court of appeals observed, "an appellate court may in its discretion correct a plain error only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* at 17a-18a (citing *Johnson*, 520 U.S. at 467). The court held that petitioners had not established reversible error under that standard because the evidence would support a jury finding that the misrepresentations and omissions were in fact material:

> Defendants do not show that the inclusion of a materiality instruction in the already complex charge would have altered the outcome of the jury's deliberations. While defendants put on a vigorous defense, the jury obviously accepted the government's theory that defendants schemed to fraudulently siphon off the assets of PNRRG from the inception of their dealings with PNRRG and the [Department of Insurance]. There was clear evidence of materiality.

*Id.* at 18a.

---

a material fact, provided it is made with intent to defraud." However, the jury charge did not plainly explain that materiality of falsehood is a separate element of the mail and wire fraud statutes. Defendants did not object to the trial court's failure to so instruct the jury.

Pet. App. 17a.

## ARGUMENT

1. Petitioners contend (Pet. 12-27) that the court of appeals erred in the earlier appeal by reversing the district court's order granting a new trial. They maintain that the decision below conflicts with decisions of other courts because it (a) does not require the government to correct the false testimony of its witnesses on cross-examination and (b) applies an unduly restrictive standard of materiality to determine when the introduction of perjured testimony at trial requires reversal. This case differs from those on which petitioners rely, however, because petitioners exposed the witness's false testimony at trial and argued to the jury that the witness was thoroughly impeached. Further review is therefore unwarranted.

a. In *Napue* v. *Illinois*, 360 U.S. 264 (1959), the principal government witness in a murder trial falsely testified that the prosecutor had not promised him any consideration in exchange for his testimony. The prosecutor did not correct the false testimony at trial. This Court reversed, holding that a conviction obtained through the use of false testimony violates the defendant's rights under the Due Process Clause. *Id.* at 269. The Court stated that the same result obtains when the government, although not soliciting false evidence, allows it to go uncorrected when it appears. *Ibid.* The Court also held that reversal of the defendant's conviction is required if there is "any reasonable likelihood" that the false testimony affected the jury's verdict. *Id.* at 271.

In *Giglio* v. *United States*, 405 U.S. 150 (1972), the government's only witness linking the defendant to the charged forgery offense testified on cross-examination that he had not been offered leniency by the govern-

ment. *Id.* at 151-152. The prosecutor did not correct that testimony. *Id.* at 152. After trial, it was revealed that another prosecutor had offered a deal to the witness in exchange for his testimony. *Ibid.* Relying on *Napue*, this Court reversed, stating that the witness's credibility was important and that the jury was entitled to know of any consideration given to the witness by the government. *Id.* at 154-155.

Based on *Napue* and *Giglio*, the courts of appeals have held that a defendant's due process rights are violated if a critical government witness testifies falsely, either on direct or on cross-examination; the prosecutor does not correct the false testimony; and there is a reasonable likelihood that the false testimony affected the outcome of the trial. See, *e.g.*, *United States* v. *White*, 238 F.3d 537, 540 (4th Cir. 2001); *United States* v. *Burch*, 156 F.3d 1315, 1328 (D.C. Cir. 1998), cert. denied, 526 U.S. 1011 (1999). On the other hand, the courts of appeals agree that no due process violation occurs if a government witness provides false or contradictory testimony, but the defense exposes the falsity or contradiction on cross-examination. See, *e.g.*, *United States* v. *Joyner*, 201 F.3d 61, 82 (2d Cir. 2000); *United States* v. *Perkins*, 94 F.3d 429, 432-433 (8th Cir. 1996), cert. denied, 519 U.S. 1136 (1997); *United States* v. *Langston*, 970 F.2d 692, 700-701 (10th Cir.), cert. denied, 506 U.S. 965 (1992); *United States* v. *Santiago*, 798 F.2d 246, 247-248 (7th Cir. 1986). Where the defense has fully exposed the witness's false or contradictory testimony at trial, the courts do not require the prosecutor to engage in the pointless and redundant

exercise of formally correcting that testimony. See *Joyner*, 201 F.3d at 82; *Santiago*, 798 F.2d at 247-248.[4]

In the instant case, the court of appeals expressly found that any falsehoods in Donaldson's testimony "were sufficiently exposed before the jury to enable the jury to weigh those falsehoods in its deliberations." Pet. App. 57a. The district court gave a "strong cautionary statement in the jury instructions," and petitioners argued at length to the jury that Donaldson's testimony had been thoroughly impeached by the exposure of his falsehoods. *Id.* at 58a & n.10. The court of appeals further explained that Donaldson's false testimony was limited to "collateral matters" and that the rest of Donaldson's trial testimony was "overwhelmingly corroborated by other witnesses." *Id.* at 60a. Petitioners cite no case reversing a criminal conviction under comparable circumstances.

b. Because Donaldson's falsehoods were disclosed at trial, this is not an appropriate case to determine whether the court of appeals erred in using the "reasonable probability" standard of materiality (Pet. App. 52a, 62a) to determine whether a new trial was required. In false testimony cases, this Court has held that reversal is required if there is any "reasonable likelihood" that the false testimony could have affected the jury's verdict. See *Giglio*, 405 U.S. at 154; *Napue*, 360 U.S. at 271. In cases involving the government's failure to disclose exculpatory evidence to the defense, the Court has held that constitutional error occurs if there is a

---

[4] The cases cited by petitioners (Pet. 14-15) for the proposition that the prosecutor must correct false testimony involve the situation in which the false testimony was not exposed by any party at trial. They do not suggest, much less require, that the prosecutor must correct false testimony after the defense has already done so.

"reasonable probability" that the result of the proceeding would have been different if the evidence had been disclosed. See, *e.g.*, *Kyles* v. *Whitley*, 514 U.S. 419, 433-434 (1995). The "reasonable likelihood" standard is more favorable to the defense than the "reasonable probability" standard. *United States* v. *Rodriguez*, 162 F.3d 135, 147 (1st Cir. 1998), cert. denied, 526 U.S. 1152 (1999).

It is far from clear that either the "reasonable likelihood" or "reasonable probability" standard applies when the truthful evidence is ultimately disclosed to the defense and the jury at trial. In false testimony cases in which the witness's falsehoods or contradictory statements were ultimately revealed to the jury, some courts of appeals have simply stated that the disclosure of the truth eliminates any taint that the false testimony might otherwise have caused. See, *e.g.*, *Joyner*, 201 F.3d at 82. Similarly, in cases involving the delayed disclosure of exculpatory evidence, some courts of appeals simply ask whether the defense was able to make effective use of the evidence. See, *e.g.*, *United States* v. *Higgins*, 75 F.3d 332, 335 (7th Cir. 1996); *United States* v. *Walsh*, 75 F.3d 1, 8 (1st Cir. 1996).

It is also unclear whether the Fifth Circuit is firmly committed to applying the "reasonable probability" standard in false testimony cases. In two other recent decisions, the Fifth Circuit has stated the test for materiality in a false testimony case as the "reasonable likelihood" standard. See, *e.g.*, *Barrientes* v. *Johnson*, 221 F.3d 741, 752-753 (5th Cir. 2000), cert. dismissed, 121 S. Ct. 902 (2001); *United States* v. *Maloof*, 205 F.3d 819, 827 (5th Cir.), cert. denied, 121 S. Ct. 176 (2000). In any event, petitioner would not be entitled to relief under either a "reasonable probability" or "reasonable likelihood" standard. Donaldson's falsehoods were dis-

closed at trial; the falsehoods referred only to collateral matters; Donaldson's testimony was corroborated by other witnesses; the defense capitalized on the falsehoods to argue to the jury that Donaldson was unworthy of belief; and the jury received an appropriate cautionary instruction.

2. Petitioners contend (Pet. 27-28) that the court of appeals erred in placing on them the burden of establishing prejudice from the district court's failure to instruct the jury on materiality, and that the decision below conflicts with the Second Circuit's decision in *United States* v. *Viola*, 35 F.3d 37 (1994), cert. denied, 513 U.S. 1198 (1995). That claim does not warrant further review.

a. Federal Rule of Criminal Procedure 52(b) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." In *United States* v. *Olano*, 507 U.S. 725 (1993), this Court explained that under Rule 52(b), a criminal defendant who fails to object to an alleged error at trial is entitled to relief on appeal only if he can make four distinct showings. The defendant must establish that the district court committed (1) an "error" (2) that was "plain," in the sense of "clear" or "obvious," and (3) that "affect[ed] [his] substantial rights." 507 U.S. at 732-735. Under the third ("substantial rights") prong of the *Olano* analysis, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.* at 734. Even when those showings are made, a reviewing court may exercise its discretion to reverse a conviction for plain error only (4) "if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 736 (quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)).

In *Olano*, the government "essentially concede[d]" that the error in question—the presence of alternate jurors during jury deliberations in violation of Federal Rule of Criminal Procedure 24(c)—was "plain." 507 U.S. at 737. In concluding that the error satisfied the second prong of the "plain error" standard, the Court therefore was not required to "consider the special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." *Id.* at 734. In *Johnson* v. *United States*, 520 U.S. 461, 468 (1997), the Court decided the question left open in *Olano*, holding that "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration."

b. In *Viola*, 35 F.3d at 41-42, the Second Circuit relied on the above-quoted language from *Olano* in fashioning an exception to the general rule that the defendant bears the burden of establishing prejudice in a plain-error inquiry under Rule 52(b). The *Viola* court held that "[w]hen a supervening decision alters settled law, the three *Olano* conditions for reviewing plain error under Rule 52(b) still must be met, but with one crucial distinction: the burden of persuasion as to prejudice (or, more precisely, lack of prejudice) is borne by the government, and not the defendant." 35 F.3d at 42;[5] see also *United States* v. *Santiago*, 238 F.3d 213,

---

[5] The court in *Viola* acknowledged that a defendant who fails to assert a timely objection at trial "rightly bears the burden of proving prejudice in the ordinary case." 35 F.3d at 42. The court found, however, that "[t]he situation is different when a supervening decision alters settled law. A defendant clearly has no duty to object to a jury instruction that is based on firmly established circuit authority. He cannot be said to have 'forfeited a right' by

215 (2d Cir. 2001); *United States* v. *Malpeso*, 115 F.3d 155, 165 (2d Cir. 1997), cert. denied, 524 U.S. 951 (1998); *United States* v. *Ballistrea*, 101 F.3d 827, 835 (2d Cir. 1996), cert. denied, 520 U.S. 1150 (1997); *Napoli* v. *United States*, 45 F.3d 680, 683 (2d Cir.), cert. denied, 514 U.S. 1084 (1995). That holding is incorrect and has been effectively superseded by this Court's decision in *Johnson*.

*i.* The Court in *Olano* did not leave open (or explicitly allude to) the question whether, in a plain-error inquiry under Rule 52(b), the burden of persuasion as to prejudice should shift to the government when a supervening decision alters settled law. Rather, the *Olano* Court noted (while declining to resolve) the distinct question whether an error is "plain" within the meaning of Rule 52(b) when the law is unsettled at the time of trial but the erroneous character of a district court ruling is clear by the time that the court of appeals decides the case. 507 U.S. at 734; see p. 14, *supra*. The Court later resolved that question in *Johnson*, holding that under those circumstances an error is "plain" for purposes of the second prong of Rule 52(b) analysis. 520 U.S. at 468. Nothing in *Olano* suggests the existence of a "settled law" exception to the Court's facially unqualified holding that under Rule 52(b), "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." 507 U.S. at 734.

*ii.* *Johnson* was decided after *Viola* and effectively supersedes *Viola*'s "settled law" exception to the generally applicable requirements of Rule 52(b). In *Johnson*, the district court, in accordance with existing

---

not making an objection, since at the time of trial no legal right existed." *Ibid.*

circuit precedent, decided the issue of materiality in a perjury prosecution. 520 U.S. at 463-464. After Johnson was convicted, this Court issued its decision in *United States* v. *Gaudin*, 515 U.S. 506 (1995), which held that the materiality of a false statement is a question for the jury. See 520 U.S. at 464. On appeal, Johnson argued that the district court's failure to submit the issue of materiality to the jury required reversal of his conviction. *Ibid.*

This Court held that, given the defendant's failure to assert a timely objection at trial, his challenge was reviewable for plain error under Rule 52(b). Applying the plain-error standard set forth in *Olano*, the *Johnson* Court held that the district court's failure to submit the question of materiality to the jury was error and that the error was plain. 520 U.S. at 467-468. The Court questioned whether the district court's error had affected Johnson's substantial rights. *Id.* at 468-469. The Court declined to resolve that issue, however, finding that in any event the error did not meet the final requirement of *Olano* because it did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. See *id.* at 469-470.

*Johnson* thus makes clear that, even when a district court ruling accords with existing circuit precedent at the time of trial, a defendant who fails to assert a timely objection may obtain relief on appeal only if he can establish plain error under the standards set forth in *Olano*. And, as *Olano* clearly provides, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." 507 U.S. at 734; see also *id.* at 741 ("Whether the Government could have met its burden of showing the absence of prejudice, under Rule 52(a), if respondents had not forfeited their claim of error, is not at issue here. This

is a plain-error case, and it is respondents who must persuade the appellate court that the [error] was prejudicial.").[6]

*iii.* In light of *Johnson*, it is unclear whether the Second Circuit will continue to adhere to *Viola*'s modified plain-error rule. In *United States* v. *Knoll*, 116 F.3d 994 (2d Cir. 1997), cert. denied, 522 U.S. 1118 (1998), decided after *Johnson*, the Second Circuit rejected the defendant's claim that the trial court's pre-*Gaudin* failure to submit the issue of materiality to the jury in his perjury prosecution constituted plain error. Like this Court in *Johnson*, the Second Circuit in *Knoll* found that the first two prongs of *Olano* were satisfied, but declined to decide whether the error affected the defendant's substantial rights, on the ground that there was no basis for finding that the materiality element was not met and the error therefore did not "seriously affect[] the fairness, integrity or public reputation of judicial proceedings." See 116 F.3d at 1000-1002. The court declined to address the defendant's argument that *Viola*'s "modified" plain-error standard of review should apply in determining whether the third prong of *Olano* was met. *Id.* at 1001 ("There is no need for us to address this argument * * * because we resolve this

---

[6] No other circuit has adopted the modified plain-error rule embraced by the Second Circuit in *Viola*. In *United States* v. *Baumgardner*, 85 F.3d 1305, 1309 n.2 (1996), the Eighth Circuit noted the Second Circuit's holding in *Viola*. The Eighth Circuit declined to address the question, however, stating that "although we find the *Viola* analysis persuasive, we leave the issue of burden-shifting for another day." *Ibid.* The court's decision in *Baumgardner*, moreover, predates *Johnson*, which clarifies that the usual plain-error analysis applies in cases where the contested district court ruling is consistent with then-existing circuit precedent.

appeal without reaching possible issues raised by the third prong of *Olano*."). But see *Santiago*, 238 F.3d at 215 (describing "modified plain error" rule of *Viola* without mentioning *Johnson*, but rejecting defendant's contention that intervening decisions had altered settled circuit law). Until the Second Circuit has either reaffirmed or disavowed the *Viola* standard in light of *Johnson*, review by this Court would be premature.[7]

c. Even if the question whether the defendant or the government bears the burden of proof in this context otherwise warranted this Court's review, the instant case would be an unsuitable vehicle for deciding it. The theory of the government's case was that petitioners and O'Brien persuaded PNRRG and the Louisiana Department of Insurance to approve the reinsurance agreement and to authorize the transfer of over $10 million in cash assets of PNRRG to a trust account with the funds to be held on behalf of BCI, based on the defendants' false assurances that the reinsurance program would be backed by Sphere Drake, that coverage of PNRRG's physicians would continue, and that BCI would pay all future claims. In defining "scheme to defraud," the district court's instructions concerning the government's charge of an intangible-rights deprivation emphasized that a criminal breach of the employee's duty of loyalty may be found "when, with specific intent to defraud, the employee conceals or fails to disclose information which the employee has reason to believe would cause harm to the employer or would lead a reasonable employer to change its business

---

[7] In *United States* v. *Malpeso*, *supra*, decided less than one month after this Court's decision in *Johnson*, the Second Circuit applied *Viola*'s modified plain-error standard, without any discussion of *Johnson*. See 115 F.3d at 165.

conduct." 86 R.A. 127. The district court also instructed the jury that "[a] statement or representation is 'false' within the meaning of the wire fraud and mail fraud statutes when it constitutes a half truth, or effectively conceals a material fact, provided it is made with intent to defraud. To act with intent to defraud means to act with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self." *Ibid.* The court further instructed that "[s]pecific intent to defraud may also be found from a material misstatement of fact made with reckless disregard of the facts." *Id.* at 128. Thus, although "the jury charge did not plainly explain that materiality of falsehood is a separate element of the mail and wire fraud statutes," Pet. App. 17a, the district court's instructions adequately ensured that petitioners would not be convicted of mail or wire fraud based on false statements having no natural capacity to influence the conduct of PNRRG or the Louisiana Department of Insurance.

Indeed, materiality was not seriously contested at trial. Petitioners did not dispute that their activities were capable of influencing the Insurance Department and the insured physicians. Rather, their defense was one of good faith—that their diversion of millions of dollars was legitimate business conduct, conducted not with intent to defraud, but for a legal purpose. See Gov't. C.A. Br. 55-56. Accordingly, allocation of the burden of persuasion to the government on the issue whether any omission of a materiality instruction prejudiced petitioners would have no effect on the outcome of this case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BARBARA D. UNDERWOOD
*Acting Solicitor General*
JOHN C. KEENEY
*Acting Assistant Attorney General*
THOMAS E. BOOTH
*Attorney*

MAY 2001